LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 8 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1078

EDWIN J. HERPICH, on Behalf of All the Stockholders of NATIONAL AMERICAN LIFE INSURANCE COMPANY,

Petitioner

versus

ROBERT E. WILDER and NATIONAL AMERICAN LIFE INSURANCE COMPANY, a Louisiana Corporation,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Fifth Circuit

CRENSHAW AND WALLER
Suite 206 Washington Building
Montgomery, Alabama 36104

Attorneys for Respondent,
Robert E. Wilder

Of Counsel

JACK CRENSHAW
CRENSHAW AND WALLER
Suite 206 Washington Building
Montgomery, Alabama 36104

TABLE OF CONTENTS

Authorities Cited:	Page
Cases Cited	ii
Statutes Cited	iii
Rules and Regulations Cited	iii
Other Authorities Cited	iii
Opinions Below	1
Questions Presented	2
Statement of the Case	2
Summary of the Argument	5
Argument	6
I It is not illegal for a controlling shareholder to derive a premium from the sale of controlling bloc of stock	7
II Congress did not intend to preempt from State regulation, all relationships between officers, controlling shareholders, and other individual shareholders	8
III The Court should consider economic reality and the effect upon securities markets and corporate affairs	11
IV The Petition in Docket No. 1159, Superintendent of Insurance as liquidator for Manhattan Casualty Company vs. Bankers Life & Casualty Company is immaterial in this case	13
Conclusion	14
Appendix:	
I Amended Complaint	15
II Statement of Issues Presented for Review	31

AUTHORITIES CITED

Cases Cited

	Page
Dasho v. Susquehanna Corp., (ND. Ill.), Feb. 6, 1970, CCH, Federal Securities Law Reporter, p. 93, 607, at 93, 624	5
Essex Universal Corp. v. Yates, 305 F. 2d 574, 576	5, 7
Goode v. Powers, 97 Ariz. 75, 397 Pac. 2d 56	5
Herpich v. Wallace, 430 F. 2d 792-818	1, 3, 4, 6, 9, 10
Herpich v. Wilder, 430 F. 2d 818	1, 3
Honigman v. Green Giant Co., 208 F. Supp. 754, Aff. 309 F. 2d 667, Cert. Den. 372 US 941, (1963)	5, 7
Levy v. American Beverage Corp. 265 App. Div. 208, 218; 38 NYS 2d 517, 526	5
Pacific Insurance Co. v. Blot, 267 F. Supp. 956	11
SEC v. Capital Gains Research Bureau, 375 US 180, 186, 84 S. Ct. 275, 280; 11 L. ed 2d 237	9
SEC v. W. J. Howey Co., 328 US 293, 298; 90 L. ed 1244, 1249; 66 S. Ct. 1100; 163 ALR 1043	11
SEC v. Texas Gulf Sulphur Co., 401 F. 2d 833, at 860	9
Security Life & Accident Insurance Co. v. Carlovitz, 351 Ala. 508, 511; 38 So. 2d 274	5, 8
Shell v. Hensley, 430 F. 2d 819, 827	1

Stanton v. Schenck, 140 MISC. 621, 251 NYS 221 5

Superintendent of Insurance as liquidator for Manhattan Casualty Co. v. Bankers Life & Casualty Co., 430 F. 2d 355 13

Tcherepnin v. Knight, 389 U. S. 332, 336, 19 L. ed 2d 564 11

US v. Phosphate Export Assn., 393 US 199, 208; 21 L. ed 2d 344, 351; 89 S. Ct. 361 11

Statutes Cited

Section 10, Securities Exchange Act of 1934, 15 USC 78j(b) 2, 9

Section 16(b), Securities Exchange Act of 1934, 15 USC 78p(b) 8

Section 27, Securities Exchange Act of 1934, 15 USC 78a(a) 8

Rules and Regulations Cited

Rule 10b-5 of the Securities and Exchange Commission 2

Rule 19(1-b) of the Supreme Court of the United States 6

Other Authorities Cited

Patrick, "Rule 10b-5, Equitable Fraud and Schoenbaum v. Firstbrook: Another Step in the Continuing Development of Federal Corporation Law", 21 Ala. Law Review 457 (1969) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1078

EDWIN J. HERPICH, on Behalf of All the Stockholders of NATIONAL AMERICAN LIFE INSURANCE COMPANY,

Petitioner

versus

ROBERT E. WILDER and NATIONAL AMERICAN LIFE INSURANCE COMPANY, a Louisiana Corporation,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Fifth Circuit

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit in this case, in which review is sought, appears in the advance sheets for November 9, 1970, 430 F. 2d 818. The companion case of **Herpich v. Wallace**, as to which no review was sought, appears in the advance sheets, 430 F. 2d 792-818. The case of **Shell v. Hensley**, to which neither Respondent Wilder nor Respondent National American was a party, but which did include as Defendants, the individuals named in **Herpich v. Wallace**, 430 F. 2d 792, is reported at 430 F. 2d 819-827.

QUESTIONS PRESENTED

1. Does the Securities Exchange Act of 1934 [15 USC 78j(b)] and Rule 10b-5 make illegal the previously recognized right of the holder of "control" stock to derive a premium above the general market price?

2. Does each individual holder of shares of a corporation, who does not engage in any securities transaction, have a right of action under Rule 10b-5 against the president of the corporation, based solely upon the fact that he made a private sale of his privately owned stock without forcing the purchaser to offer the same purchase price to every other individual holder of shares in that corporation?

STATEMENT OF THE CASE

Prior to January 24, 1968, Respondent Wilder owned 6.32 per cent of the stock of National American Life Insurance Company. He also owned 55.39 per cent of the stock of the holding company, First Colonial Corp. of America, which itself owned 26.81 per cent of the stock of National American. Wilder, therefore, controlled directly or indirectly a total of 33.13 per cent of the stock of National American. Wilder was president and director of both National American and First Colonial. (Complaint, Para. 2, Appendix I, infra, p. 16).

In a privately negotiated sale as to which there is no charge of misrepresentation or failure to disclose, Wilder sold this controlling bloc of stock to National Securities, Inc. for Five Million Dollars, which was allegedly Three Million Dollars in excess of the then market value of the stock. 430 F. 2d at 798. The

purchasers are apparently well satisfied with their purchase.

However, Petitioner Herpich, who in 1955 purchased his stock in National American, instituted suit against both the seller, Wilder, and the purchaser, National Securities, Inc., and its controlling officers, Robert Wallace and his "Arizona Group". The suit against the seller, Respondent Wilder, was filed in the Middle District of Alabama, and that against the purchaser was filed in the Eastern District of Louisiana. Both actions purported to be derivative actions on behalf of the corporation, National American, and, also, on behalf of Herpich, individually, and all other individual shareholders of National American.

The District Judge, in each case, granted Motion to Dismiss. On appeal, both cases were affirmed in part and reversed in part. **Herpich v. Wilder**, 430 F. 2d 818-9; **Herpich v. Wallace**, 430 F. 2d 792-817.

In both cases, the Court of Appeals held that the Complaint stated no cause of action under the Investment Company Act. Petition for Certiorari does not question the correctness of this ruling. In both cases, the Court of Appeals affirmed the dismissal of the Count based upon a loan to the accountant, Latta, and again no question is raised as to the correctness of that ruling.

As to the other two Counts in both Complaints, the Court of Appeals held that the District Court erred in granting the Motion to Dismiss and that the actions could be maintained as a derivative action on behalf of the Corporation, National American, which was alleged to have been defrauded in that it would

be required to pay a part of the allegedly excessive purchase price for Wilder's stock.

In the opinion in **Herpich v. Wallace**, 430 F. 2d 792, the Court of Appeals considered at great length the purpose and objects of the Securities Acts and Rule 10b-5. Following the reasoning of the Eighth Circuit and the Second Circuit, the Court of Appeals adopted for the Fifth Circuit the rule that only purchasers and sellers of securities involved in an alleged 10b violation can show injury of the type the rule is meant to prevent. Since the Plaintiffs, individually, and other individual shareholders, were neither purchasers nor sellers of securities, the Court held that Plaintiffs were not entitled to bring an action under Rule 10b-5 on behalf of themselves or their class. **Herpich v. Wallace**, 430 F. 2d 792, at 803.

The Petitioner in this case was the party Appellant in **Herpich v. Wallace** and did not seek to review the decision of the Court of Appeals in that case.

The Opinion here sought to be reviewed is less than two pages long. It sets forth no new rule of law, but only:

> "Therefore, for the reasons set forth in our opinion in the Wallace case, we hold that the judgment appealed from must be reversed in part."

We are, therefore, faced with the anomaly that Petitioner Herpich asks this Honorable Court to review and revise the judgment of the Court of Appeals, which merely applied to the facts of this case the principles of law announced by the same court in

another case to which Herpich was a party, the correctness of which Herpich did not question by Petition for Certiorari.

SUMMARY OF THE ARGUMENT

I

Normally a controlling shareholder has the right to derive a premium from the sale of controlling bloc of stock.

Essex Universal Corp. v. Yates, 305 F. 2d 574, 576.

Levy v. American Beverage Corp., 265 App. Div. 208, 218, 38 NYS 2d 517, 526.

Stanton v. Schenck, 140 MISC. 621, 251 NYS 221.

Honigman v. Green Giant Co., 208 F. Supp. 754, Aff. 309 F. 2d 667, CD. 372 US 941 (1963).

Dasho v. Susquehanna Corp., (ND. Ill.), Feb. 6, 1970, CCH, Federal Securities Law Reporter, p. 98, 607, at 98,624.

Goode v. Powers, 97 Ariz. 75, 397 Pac. 2d 56.

a. In Alabama any restriction on the right of a shareholder to transfer his shares must be construed strictly and may be in contravention of public policy as an illegal restraint upon transfer.

Security Life & Accident Ins. Co. v. Carlovitz, 251 Ala. 508, 511; 38 So. 2d 274.

II

In the passage of the various Securities Acts it was not the intent of Congress to establish a "Uniform Federal Law of Corporations", to preempt to

the Securities and Exchange Commission the regulation of relationship between corporate officers and shareholders, or to give each individual shareholder a right of action against a controlling shareholder who does what is otherwise legal, that is, sell his privately owned shares at private sale, free of misrepresentation or failure to disclose, at a price satisfactory to the purchaser.

ARGUMENT

At the outset, we face the fact that the principles of law of which Petitioner complains were not announced by the Court of Appeals in this case, but in another case, **Herpich v. Wallace**, to which Petitioner was a party, but which Petitioner did not seek to review. The quotations in the Petition, p. 5, and on p. 14, are quotations from the **Wallace** opinion, not the opinion in this case. In effect, therefore, Petitioner is seeking to review the action of the Court of Appeals in applying to the facts in this case, the principles of law announced by the same Court of Appeals in another case, which was not reviewed. That hardly comes within the scope of Rule 19 (1-b).

Secondly, there is grave doubt as to whether the issue now sought to be raised was raised before the Court of Appeals. In the Statement of Issues Presented for Review, filed in that Court, (Appendix II hereto, p. 31), no effort was made to raise the issue of the rights of the individual shareholders separate and apart from that of the corporation suing derivatively. Issue Number One specifically pointed out that part of the purchase price was paid by the corporation, National American, and charges that "Wilder never accounted and never intended to ac-

count to, National American Life Insurance Company or to its stockholders for said premium". The Court of Appeals upheld the right of the corporation, National American Life Insurance Company, to proceed under Rule 10b-5.

Entirely aside from those preliminary questions, we respectfully submit that the principles of law announced by the Court of Appeals were entirely correct and that the ruling sought by Petitioner would do violence to both the letter and spirit of the Securities Acts and would wreak havoc with the Securities markets which Congress sought to protect.

I

It is not illegal for a controlling shareholder to derive a premium from the sale of controlling bloc of stock.

Unless rendered illegal by the Securities Exchange Act of 1934, the right of a controlling shareholder to derive a premium from the sale of a controlling bloc of stock has been generally upheld by the Courts. **Essex Universal Corp. v. Yates**, 305 F. 2d 572, at 576, and cases cited; **Honigman v. Green Giant Co.**, 208 F. Supp, 754, Aff. 309 F. 2d 667, Cert. Denied 372 US 941 (1963).

Although Professor A. A. Berle advanced the view that control is a corporate asset, this issue is not raised on this Petition since there is involved here only the question of the right of minority stockholders to require the controlling shareholder to account, not to the corporation, but to each other individual shareholder.

In Alabama restrictions on the right of a shareholder to transfer his shares are construed strictly

and may be held violative of public policy. **Security Life & Accident Ins. Co. v. Carlovitz**, 251 Ala. 508, 511; 38 So. 2d 274.

II

Congress did not intend to preempt from State regulation, all relationships between officers, controlling shareholders, and other individual shareholders.

Petition cites on page 8, an article written by Petitioner's Attorney in 21 Ala. Law Review 457, in which he treats Rule 10b-5 as "another step in the continuing development of Federal Corporation Law". It is his theory that Congress intended the Securities Exchange Act and Rule 10b-5 to establish a full blown Federal Law of Corporations. In view of the exclusive jurisdiction provision of Section 27 of the Act and the principle of preemption, this position, if followed, would take away all rights of State legislatures and State courts to regulate the relationship of officers and directors and controlling persons of domestic corporations, to all other holders of shares of that corporation.

This is far removed from the congressional intent to regulate the sale of securities itself; for the individual shareholders on whose behalf this Petition is filed did not participate in any purchase or sale of securities in question.

Congress did expressly regulate the purchase and sale of securities by insiders in Section 16b of the Exchange Act [15 USC 78p(b)]. Even in that case, however, the liability of the insider is not to the individual shareholder, but to the corporation itself. This specific provision as to sales by controlling

shareholders negatives the conclusion that the broad language of Section 10 and Rule 10b-5 were intended to prohibit sales of control at private sale which otherwise would be legal and proper.

There have been many expressions in this Court and Courts of Appeals as to the purpose and objectives of the Securities Act. In **SEC v. Capital Gains Research Bureau**, 375 US 180, 186; 84 S. Ct. 275, 280; 11 L. ed 2d 237, this Court stated that a fundamental purpose of the act was "to substitute a philosophy of full disclosure for the philosophy of caveat emptor".

The Court of Appeals for the Fifth Circuit states:

> "By Section 10b Congress meant to prevent manipulation and control of the prices at which securities are bought and sold and to enable buyers, sellers, and traders of securities to make a proper appraisal of the value of securities. Securities Exchange Act of 1934, Sec. 2(3), 15 USC, Sec. 78b(3). See also Hearings on Stock Exchange Regulation Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934); Ruder, Civil Liability Under Rule 10b-5, Judicial Revision of Legislative Intent?, 57 Nw. U. L. Rev. 627, 657 (1963)." **Herpich v. Wallace**, 430 F. 2d 792, at 801.

In **Securities and Exchange Commission v. Texas Gulf Sulphur Co.**, 401 F. 2d 833, at 860, the Court of Appeals for the Second Circuit, said:

> "[29, 30] Therefore it seems clear from the legislative purpose Congress expressed in the Act, and the legislative history of Section 10 (b) that Congress when it used the phrase 'in con-

nection with the purchase or sale of any security' intended only that the device employed, whatever it might be, be of a sort that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities."

Again, in **Herpich v. Wallace**, 430 F. 2d at 806:

"In short Congress meant to afford investors a reasonable opportunity to make knowing intelligent decisions regarding their purchases and sales of securities in unmanipulative markets, see Kahan v. Rosenstiel, 3 Cir., 1970, 424 F. 2d 161, 173, and the loss resulting in connection with purchases or sales made without benefit of such an opportunity is the type of injury section 10(b) and Rule 10b-5 seek to prevent. See Mutual Shares Corporation v. Genesco, Inc., 2 Cir., 1967, 384 F. 2d 540, 546. See also Britt v. Cyril Bath Company, 6 Cir., 1969, 417 F. 2d 433, 435."

The requirement of full disclosure; enabling buyers and sellers to make a proper appraisal of the value of securities; the prevention of devices which would cause reasonable investors to rely thereon and in connection therewith so relying, cause them to purchase or sell securities; and the affording of investors a reasonable opportunity to make knowing intelligent decisions regarding their purchases and sales of securities, fall far short of establishing a Congressional intent to prohibit the sale of securities at private sale, without misrepresentation or concealment, at a price satisfactory to the purchaser. Petition cites no authority to sustain the position that Congress intended to give a new federal cause of

action to every holder of shares of a corporation, who was in no way misled, who in no way participated in the purchase or sale of securities, because the president, in selling his privately owned stock, did not force the purchaser to make a similar offer to all other shareholders.

III

The Court should consider economic reality and the effect upon securities markets and corporate affairs.

In three cases, this Court has referred to the necessity of looking at the economic reality of the transaction. **US v. Phosphate Export Assn.**, 393 U. S. 199, 208; 21 L. ed 2d 344, 351; 89 S. Ct. 361; **Tcherepnin v. Knight**, 389 U. S. 332, 336; 19 L. ed 2d 564, 569, 89 S. Ct. 548; **SEC v. W. J. Howey Co.**, 328 U. S. 293, 298; 90 L. ed 1244, 1249, 66 S. Ct. 1100; 163 ALR 1043.

On page 12 of Petition, reference is made to the Brief for SEC as amicus curiae in the case of **Pacific Insurance Co. v. Blot**, 267 F. Supp. 956. On page 9 of that Brief, Counsel for the Commission cautioned against a ruling that would be "unnecessarily drastic and potentially unsettling for the securities markets and corporate affairs".

We can think of few rulings which would be more disastrous to the securities markets, than a ruling which would vest in every individual shareholder an individual right of action against every seller of a bloc of stock which might be characterized as "control". We are not here concerned with sales of stock quoted on National Securities Exchanges.

Thousands of corporations have stock unlisted on any exchange and seldom traded on the over-the-counter market. In case of a "thin" market, the bid and ask price would give no indication of the true investment value of the securities in question.

In such a case, [and such a case arises everyday], the offer of a substantial bloc on the open market would result in the very disruption of orderly trading which Congress sought to prevent. The economic loss would not only be suffered by the person who offered a substantial bloc, it would be shared by every other seller on such depressed market.

A similar situation would develop if the prospective purchaser sought to acquire a substantial bloc on the open market rather than by private negotiated sale. Again, there would be a disruption of orderly trading and a distortion of the price of securities.

If there is a duty on the seller of a controlling bloc of stock to obtain the same price for every other shareholder, the action of the purchaser in purchasing at private sale could be characterized as inducing a breach of duty and both seller and purchaser would be liable to suit by every other individual shareholder. Such issues as to whether there was an actual premium paid, and whether the bloc of stock actually represented "control" would probably be left for the decision of the jury in each individual case. Not only would past transactions be subject to litigation, prospective purchasers and sellers of more than a nominal amount of stock would be prevented or at least deterred from the ordinary private negotiations which are recognized as legal in the cases cited above.

A purchaser could not safely purchase unlisted stock from the owner thereof without a thorough investigation to determine whether such shares, even though substantially less than 50 per cent, could conceivably be characterized as "control" stock; and the owner of any such bloc would be restrained from taking advantage of a voluntary offer of a price satisfactory to both purchaser and seller.

Such a solution might be Paradise for securities attorneys but would be Hades for the investors involved. We respectfully submit that Congress did not intend the type of chaos which would result from such a ruling.

IV

The Petition in Docket No. 1159, Superintendent of Insurance as liquidator for Manhattan Casualty Company vs. Bankers Life & Casualty Company is immaterial in this case.

Petitioner seeks to bolster its case here by reference to Petition for Certiorari Docketed under No. 1159, to review the decision of the Court of Appeals for the 2nd Circuit in **Superintendent of Insurance as liquidator for Manhattan Casualty Company vs. Bankers Life & Casualty Company**, 430 Fed. 2nd 355.

We submit that the lack of merit in the instant case is not remedied by the possible merit in Docket No. 1159 and the instant Petition should be denied because of its own lack of merit.

We further submit that the issue raised in that case is in no way related to the issue here presented.

In this case individual shareholders seek to hold the seller of "control", responsible to them individually, not to the corporation. In this case there was no depletion of the funds of the corporation or of the Plaintiffs individually. In this case the only alleged crime was that Respondent, Wilder, sold his privately owned stock at private sale without misrepresentation or concealment, to a private purchaser who is satisfied with his purchase.

While the Bankers Life case does involve a sale of control, the claim for damages was strictly on behalf of the corporation to recover, not any alleged premium above market price, but $5,000,000.00 of assets of the corporation which were taken from the corporation's treasury. That case is typical of those involving looting; a sale of corporate control to people who intended to loot the company. No such issue is involved in this case.

CONCLUSION

For the above reasons, we respectfully submit that the Petition for Writ of Certiorari should be denied.

JACK CRENSHAW
Attorney for Respondent,
Robert E. Wilder

Of Counsel

CRENSHAW AND WALLER
Suite 206 Washington Building
Montgomery, Alabama 36104

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

EDWIN J. HERPICH, on behalf of Himself and all other stockholders (other than defendant Wilder and persons in conspiracy with him) of National American Life Insurance Company, Plaintiff vs. ROBERT E. WILDER; and NATIONAL AMERICAN LIFE INSURANCE COMPANY, a Louisiana corporation, Defendants	CIVIL ACTION No. 2747-N

AMENDED COMPLAINT

Pursuant to leave of Court granted by this Court's Order of October 24, 1968 herein, plaintiff, acting by his attorneys, hereby amends his Complaint herein to read as follows:

I.

Plaintiff

Plaintiff EDWIN J. HERPICH is a resident citizen of Louisiana. Plaintiff HERPICH is now and has continuously since, to-wit, 1955 been the owner of, to-wit, 1,000 shares of common stock of NATIONAL AMERICAN LIFE INSURANCE COMPANY.

II.

Defendants

1. Defendant NATIONAL AMERICAN LIFE INSURANCE COMPANY is a Louisiana corporation qualified to do business and doing business in Alabama. Its home office is now, and its principal office and place of business until at least, to-wit, February, 1968 was, in Baton Rouge, Louisiana. On information and belief, its executive offices are now in Phoenix, Arizona.

2. Defendant ROBERT E. WILDER is on information and belief a resident citizen of Montgomery, Alabama and is over the age of twenty-one years. At all times relevant between, to-wit, the incorporation of NATIONAL AMERICAN LIFE INSURANCE COMPANY in, to-wit, 1955 and, to-wit, February 14, 1968, defendant WILDER was president, chairman of the board of directors, a director, and a "controlling person" of NATIONAL AMERICAN LIFE INSURANCE COMPANY and of First Colonial Corp. of America within the meaning of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Securities Act of Alabama.

III.

Jurisdiction and Venue

This Court has jurisdiction of so much of this action as is based upon violations of the federal securities acts pursuant to the provisions of Section 27 of the Securities Exchange Act of 1934 (15 U. S. C. §78aa), Section 22 of the Securities Act of 1933 (15 U. S. C. §77v), Section 44 of the Investment Company Act of 1940, and 28 U. S. C. §1377, and this

Court has pendant jurisdiction of so much of this action as is based upon state law pursuant to the principles of law enunciated by the United States Supreme Court in **Hurn v. Oursler**, 289 U. S. 238, and **United Mine Workers of America v. Gibbs**, 89 S. Ct. 1130.

2. On information and belief, venue is properly laid in this district because defendant WILDER is present and resides in this district; because defendant NATIONAL AMERICAN LIFE INSURANCE COMPANY transacts business, is qualified to transact business, and has consented to service upon it by service upon the Superintendent of Insurance of the State of Alabama in this district; and because acts were performed in this district in furtherance of the conspiracy and wrongs complained of herein.

IV.

Facts Upon Which This Complaint is Based

Each of the following allegations is made on information and belief:

COUNT ONE

1. At all times relevant to this action prior to, to-wit, January 24, 1968 defendant WILDER personally owned, to-wit, 6.32% of the issued and outstanding common capital stock of defendant NATIONAL AMERICAN LIFE INSURANCE COMPANY.

2. At all times relevant prior to, to-wit, January 24, 1968, defendant WILDER owned, to-wit, 55.39% of the issued and outstanding common capital stock of First Colonial Corp. of America.

3. At all times relevant prior to, to-wit, January 24, 1968, First Colonial Corp. of America owned, to-wit, 26.81% of the issued and outstanding common capital stock of and controlled defendant NATIONAL AMERICAN LIFE INSURANCE COMPANY.

4. At all times relevant prior to, to-wit, January 24, 1968, defendant WILDER was President and Director of and controlled First Colonial Corp. of America and NATIONAL AMERICAN LIFE INSURANCE COMPANY.

5. At all times relevant, First Colonial Corp. of America was, and held itself out to the public as being, an "investment company" as defined by the Investment Company Act of 1940, as defendant WILDER at all times relevant well knew.

6. Defendant WILDER caused First Colonial Corp. of America to omit to register and qualify as an investment company with the SEC, although required by law to so register and qualify.

7. Defendant Wilder, by the use of the mails and means and instrumentalities of interstate commerce, caused NATIONAL AMERICAN LIFE INSURANCE COMPANY to do the following:

(a) To lend First Colonial Corp. of America on no security or on grossly inadequate security various sums totalling in excess of One Million Dollars.

(b) To misrepresent and conceal said loans by filing convention reports with state insurance officials which reported the amount owed it by First Colonial Corp. of America as an asset, although

said debt was not fully secured and not due to be so reported.

(c) To guarantee various obligations of First Colonial Corp. of America.

(d) To engage with First Colonial in various purchases and sales of securities.

(e) To pay and lend WILDER various sums of money.

8. Defendant WILDER by the use of the mails and means and instrumentalities of interstate commerce caused First Colonial Corp. to engage in interstate commerce, to borrow and lend money, and to purchase and sell securities, all in violation of the Investment Company Act of 1940.

9. As a result of said illegal transaction, the assets of NATIONAL AMERICAN LIFE INSURANCE COMPANY (including its unsecured advances to First Colonial Corp. of America) were depleted and wasted, all to its detriment and to the detriment of plaintiff and similarly situated stockholders of NATIONAL AMERICAN LIFE INSURANCE COMPANY, and the value of stock of NATIONAL AMERICAN LIFE INSURANCE COMPANY owned by plaintiff and similarly situated stockholders has been diminished, all to the damage of plaintiff and similarly situated stockholders in the amount of, to-wit, Five Million Dollars ($5,000,000.00).

COUNT TWO

1. At some time on or about November 29, 1967 Robert H. Wallace, Jack E. Love, ROBERT E. WILDER, National Securities, Inc. and Old National Life

Insurance Company conspired to cause National Securities, Inc. to purchase certain shares of stock from defendant WILDER at a price higher than their then market value, to be paid in part by NATIONAL AMERICAN LIFE INSURANCE COMPANY stockholder, although legally obligated to do so, to cause WILDER to be issued an option to buy shares of Capitol National Bank of Montgomery, Alabama, and to defraud NATIONAL AMERICAN LIFE INSURANCE COMPANY, plaintiff and similarly situated stockholders of NATIONAL AMERICAN LIFE INSURANCE COMPANY.

2. Pursuant to and in furtherance of said conspiracy, and by the use of the mails and means and instrumentalities of interstate commerce, the conspirators did or caused to be done the following:

(a) National Securities, Inc. executed an agreement to purchase from WILDER his shares of capital stock of NATIONAL AMERICAN LIFE INSURANCE COMPANY and First Colonial Corp. of America, which owned a substantial number of issued and outstanding shares of capital stock of NATIONAL AMERICAN LIFE INSURANCE COMPANY.

(b) National Securities, Inc. agreed to and did, in fact, pay ROBERT E. WILDER more than the then market value of his shares of said stock in order to obtain control of NATIONAL AMERICAN LIFE INSURANCE COMPANY and its assets.

(c) As part of the agreement whereby WILDER agreed to sell said shares to National Securities, Inc., he agreed to resign as President, Director and Chairman of the Board of NATIONAL

AMERICAN LIFE INSURANCE COMPANY and to assist in electing Wallace and his associates to become officers and directors of NATIONAL AMERICAN LIFE INSURANCE COMPANY and its assets.

(d) National Securities, Inc. agreed to pay a premium for WILDER'S said shares in order to acquire control of NATIONAL AMERICAN LIFE INSURANCE COMPANY and its assets, for the purpose of enabling Wallace, National Securities, Inc., and Love to manipulate, transfer, and dispose of the assets of NATIONAL AMERICAN LIFE INSURANCE COMPANY in their own interests and without regard to and contrary to interests of NATIONAL AMERICAN LIFE INSURANCE COMPANY and all of its stockholders.

(e) The conspirators caused NATIONAL AMERICAN LIFE INSURANCE COMPANY and First Colonial Corp. of America to enter into an agreement dated on or about November 29, 1967 with Federated Investments, Inc. whereby First Colonial Corp. of America (which then was insolvent) agreed to purchase 43,200 shares of stock of Capitol National Bank of America for $1,188,000.00, and whereby NATIONAL AMERICAN LIFE INSURANCE COMPANY guaranteed the obligations of First Colonial Corp. of America.

(f) The conspirators then caused National Securities, Inc. on January 24, 1968 to grant defendant WILDER an option to purchase said 43,200 shares, representing 54% of the outstanding shares of stock of Capitol National Bank of Montgomery, Alabama.

(g) Said option was a "security" within the meaning of all applicable federal securities laws.

(h) Said option was granted to WILDER, in connection with the purchase of and as part of the purchase price paid by National Securities, Inc. for WILDER's shares of NATIONAL AMERICAN LIFE INSURANCE COMPANY stock and First Colonial Corp. of America stock.

(i) Said transaction, and the granting of said option to WILDER operated as a fraud upon NATIONAL AMERICAN LIFE INSURANCE COMPANY, plaintiff and similarly situated stockholders of NATIONAL AMERICAN LIFE INSURANCE COMPANY.

(j) National Securities, Inc. agreed to pay defendant, WILDER, in excess of, to-wit, Five Million Dollars for his said shares, said purchase price to be paid in part by NATIONAL AMERICAN LIFE INSURANCE COMPANY, in fraud on plaintiff and all similarly situated stockholders.

(k) No similar offer was made to plaintiff and other stockholders, although WILDER was obligated by law to ensure that the sale of "control" of assets of NATIONAL AMERICAN LIFE INSURANCE COMPANY or of the company not be cast in a manner advantageous only to WILDER.

3. By reason of casting the transaction with National Securities, Inc. as a sale by WILDER of his stock, rather than as a sale of assets by the company, WILDER instead of the company was paid and realized a "premium" in the amount of, to-wit, Five Million Dollars ($5,000,000.00) for control of the

assets and of the company, over and above the market value of his shares.

4. WILDER is legally obligated to account of NATIONAL AMERICAN LIFE INSURANCE COMPANY, plaintiff and all similarly situated stockholders for said premium.

5. WILDER was legally obligated to plaintiff and other similarly situated stockholders of NATIONAL AMERICAN LIFE INSURANCE COMPANY to ensure that the same offer on the same terms be made **pro rata** to all stockholders, but he did not do so.

6. Plaintiff and similarly situated stockholders have been damaged in the amount of, to-wit, Five Million Dollars by reason of facts averred in this Count Two.

COUNT THREE

1. On or about February 24, 1967, WILDER, in connection with a sale of securities by L. D. Harris to NATIONAL AMERICAN LIFE INSURANCE COMPANY, and by the use of the mails and means and instrumentalities of interstate commerce, employed devices, artifices and schemes to defraud, and engaged in a course of business dealings which operated as a fraud upon NATIONAL AMERICAN LIFE INSURANCE COMPANY, plaintiff and similarly situated stockholders.

2. On, to-wit, February 24, 1967 NATIONAL AMERICAN LIFE INSURANCE COMPANY paid Luther D. Harris, then one of its directors, $100,000.00 under the pretext, device and contrivance of making a "loan" to Harris and agreed to accept 12,947 shares of the common stock of First Colonial

Corporation of America, pledged as security for said "loan", as payment in full of said loan in the event said "loan" was not paid when due, and NATIONAL AMERICAN LIFE INSURANCE COMPANY agreed that it would not assert a deficiency against Harris, irrespective of the value of said shares at the time of default in said loan.

3. Said transaction constitutes a fraud on NATIONAL AMERICAN LIFE INSURANCE COMPANY and its stockholders in that the effect of the transaction is that, if the stock appreciates, Harris can pay off the loan and keep the stock, but in the event the stock is worth less than $100,000.00, NATIONAL AMERICAN LIFE INSURANCE COMPANY will have to purchase, to-wit, 12,947 shares of common stock of its parent for the price of, to-wit, $100,000.00, which at all relevant times has been and now is more than said shares' market value.

4. In connection with and as part of the February 24, 1967 transaction, NATIONAL AMERICAN LIFE INSURANCE COMPANY also guaranteed a loan of, to-wit, $200,000.00 made to L. D. Harris and Sons, d/b/a Express Transfer Company, a partnership, and lent money to L. D. Harris secured by a deed of trust on his home in Dallas, Texas.

5. Said transaction damaged and defrauded NATIONAL AMERICAN LIFE INSURANCE COMPANY and its stockholders in the amount of, to-wit, One Hundred Thousand Dollars ($100,000.00).

COUNT FOUR

1. On or about April 18, 1967, by the use of the mails and means and instrumentalities of interstate

commerce, defendant WILDER employed devices and artifices to defraud and engaged in transactions and a course of dealing which operated a fraud upon NATIONAL AMERICAN LIFE INSURANCE COMPANY and its stockholders, in that on, to-wit, April 18, 1967, WILDER caused NATIONAL AMERICAN LIFE INSURANCE COMPANY to arrange to have $100,000.00 paid Raymond A. Latta by the device, artifice and strategem of guaranteeing a "loan" of, to-wit, $100,000.00 to defendant Raymond A. Latta, to finance Latta's purchase of 20% of the issued and outstanding stock of Dawl Corporation, a Louisiana corporation, owned in part by WILDER, the principal assets of Dawl being an undeveloped tract of land south of Baton Rouge, Louisiana, which stock was on or about July 1, 1967 was then exchanged for stock of First Colonial Life Insurance Company.

2. The First Colonial Life stock was then pledged as security for the loan.

3. Said First Colonial Life stock is not worth the amount owed on the loan.

4. In connection with the purchase of said shares of Dawl stock, on, to-wit, May 15, 1967, NATIONAL AMERICAN LIFE INSURANCE COMPANY agreed to pay Mr. Latta $45,000.00 **plus** additional compensation for any actual work he might do.

5. First Colonial Life Insurance Company has been damaged and defrauded in the amount of, to-wit, One Hundred Fifty Thousand Dollars ($150,000.00) by reason of the facts alleged in this Count.

V.

Allegations Supporting Maintenance of This Suit As A Class Action

Each of the following allegations is made on information and belief:

1. This action is brought on behalf of all stockholders of NATIONAL AMERICAN LIFE INSURANCE COMPANY.

2. There are more than, to-wit, 12,000 members of said class, so that joinder of all members of the class is impracticable.

3. This is not a collusive action to confer jurisdiction on this Court which it would not otherwise have.

4. There are common questions of law or fact common to such class, including, but not limited to, the following:

(a) Whether defendant WILDER received a premium for "control" of, and his stock in, NATIONAL AMERICAN LIFE INSURANCE COMPANY, and in First Colonial Corporation of Delaware, at a time when he owed fiduciary duties to NATIONAL AMERICAN LIFE INSURANCE COMPANY and to plaintiff and similarly situated stockholders;

(b) Whether WILDER is due to account to NATIONAL AMERICAN L I F E INSURANCE COMPANY for said premium;

(c) Whether WILDER was legally obligated to have the same offer made pro rata to all stockholders;

(d) Whether defendant WILDER sold stock representing "control" of NATIONAL AMERICAN LIFE INSURANCE COMPANY at a premium, without making the same terms available to other stockholders, to whom he then owed a fiduciary duty not to sell his stock without making the same opportunity and offer available to them;

(e) Whether defendant WILDER caused NATIONAL AMERICAN LIFE INSURANCE COMPANY to lend money to First Colonial Corp. of America and engage in other transactions with First Colonial Corp. of America in violation of the Investment Company Act of 1940, state law, and the Securities Exchange Act of 1931;

(f) Whether WILDER is liable to NATIONAL AMERICAN LIFE INSURANCE COMPANY for the acts hereinabove alleged.

5. Prior to filing hereof, demand was not made on the Board of Directors or stockholders of NATIONAL AMERICAN LIFE INSURANCE COMPANY that they file suit on behalf of that corporation for the wrongs complained of herein, and such demand would be futile and unavailing because, on information and belief;

(a) The above alleged facts have been known by a majority of the said directors since, to-wit, February 1968, but no corrective legal action pertaining thereto has been taken or proposed.

(b) A majority of said directors are controlled or dominated by defendant WILDER or by persons who conspired with him in doing the wrongs hereinabove alleged.

(c) A majority of said directors have not heretofore and would not now take any action against WILDER because to do so might expose them to personal liability for negligence or for aiding and abetting WILDER.

(d) There are more than 12,000 stockholders of NATIONAL AMERICAN LIFE INSURANCE COMPANY and it would be unduly expensive and burdensome to require plaintiff to make prior demand on them and to fully explain the situation.

(e) The wrongs complained of cannot be ratified by stockholders without unanimous consent.

(f) Applicable law does not require such demand.

6. The claims of plaintiff are typical of the claims of the entire class.

7. The plaintiff will fairly and adequately protect the interests of the entire class.

8. The acts of defendant WILDER alleged in this Complaint are wrongs against each member of the class sued for herein, on grounds generally applicable to said class and each member thereof, making appropriate declaratory relief with respect to the class sued for as a whole.

9. The questions of law and fact common to the members of the class sued for herein predominate over any questions affecting only individual members.

10. Permitting a class action herein is and will be superior to other available methods for the adjudication of controversies and claims set out herein between members of the class sued for and the defendants herein.

VI.

Discovery of Facts Alleged Herein

Plaintiff did not discover the wrongful acts alleged herein prior to, to-wit, February 14, 1968, nor could he have discovered the same by the exercise of any duty imposed on him (if any existed) because of the concealment and misrepresentation of said facts by defendant WILDER which misrepresentations and omissions were in part for the purpose of lulling and deceiving plaintiff and members of his class, and preventing them from discovering the fraud and deceit practiced upon them.

VII.

Demand for Judgment

1. Plaintiff, on behalf of all stockholders of NATIONAL AMERICAN LIFE INSURANCE COMPANY, hereby demands judgment against defendant WILDER, for the use and benefit of NATIONAL AMERICAN LIFE INSURANCE COMPANY and all its stockholders, in the amount of $5,000,000.00.

2. Plaintiff prays that the option granted WILDER to buy Capitol National Bank stock be declared null and void.

3. Plaintiff prays for such other, further and different relief to which he may be entitled, the premises considered.

BERKOWITZ, LEFKOVITS,
VANN & PATRICK
1400 City National Bank Building
Birmingham, Alabama 35203
Attorneys for Plaintiff

By .....
J. Vernon Patrick, Jr.

DEMAND FOR TRIAL BY JURY

Plaintiff respectfully demands trial by jury. This 21st day of November, 1968.

Of Counsel for Plaintiff

VERIFICATION

STATE OF ALABAMA
JEFFERSON COUNTY

Before me, a Notary Public in and for said State, this date appeared J. Vernon Patrick, Jr., known by me, who being by me first duly sworn deposes and says as follows:

I am attorney for plaintiff herein and have investigated the allegations in the above and foregoing Amended Complaint and they are true and correct except such allegations as are made on information and belief, and as to those, I am informed and verily believe them to be true and correct.

J. Vernon Patrick, Jr.

Sworn to and subscribed before me this 21st day of November, 1968.

Notary Public

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the above Amended Complaint on all parties hereto by mailing their counsel of record a copy thereof.

This the 21st day of November, 1968.

Attorney for Plaintiff

APPENDIX II
IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27,385

EDWIN J. HERPICH, on behalf of himself and all other stockholders (other than defendant Wilder and persons in conspiracy with him) of National American Life Insurance Company,

Appellant,
(Plaintiff in Court Below)

versus

ROBERT E. WILDER; and NATIONAL AMERICAN LIFE INSURANCE COMPANY, a Louisiana corporation,

Appellees.
(Defendants in Court Below)

Appeal from the United States District Court for the Middle District of Alabama, Northern Division

---

BRIEF FOR APPELLANT EDWIN J. HERPICH

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in dismissing Count II of the Amended Complaint for failure to state a cause of action under SEC Rule 10b-5, and in entering judgment for defendants based on said dismissal, where the Amended Complaint alleges that defendant Wilder, while President and Chairman of the

Board of National American Life Insurance Company, sold his shares of stock in and "control" of National American Life at a premium greatly in excess of the market value of his said shares, alleges that part of the purchase price paid Wilder was paid by National American Life, alleges that the purchaser bought said shares in order to divert to the purchaser National American's assets, alleges that defendant Wilder cast the transaction as a sale of his stock for his personal benefit rather than in such a manner as to benefit all stockholders of National American Life, and alleges that defendant Wilder never accounted and never intended to account to National American Life Insurance Company or to its stockholders for said premium?

2. Did the trial court err in dismissing Count III of the Amended Complaint for failure to state a cause of action under SEC Rule 10b-5, and in entering judgment for defendants based on said dismissal, where the Amended Complaint alleges that National American Life was damaged because defendant Wilder caused it to pay an exorbitant purchase price to one Harris for shares of stock of another company under the pretext, guise or contrivance of a "loan" to Harris, on which there was no personal liability, "secured" by a pledge of the shares so purchased?

3. Did the trial court err in dismissing Count IV of the Amended Complaint for failure to state a cause of action under SEC Rule 10b-5, and in entering judgment for defendants based on said dismissal, where the Amended Complaint alleges that National American Life Insurance Company was damaged because Wilder caused National American Life In-

surance Company to lend $100,000.00 to one Raymond A. Latta to finance Latta's purchase of shares of stock of Dawl Corp., that shares of stock of First Colonial Corp. were then substituted for the Dawl shares as security pledged for the loan, that said First Colonial shares were and are worth less than the amount of the loan, and that in connection with said purchase of Dawl shares, Wilder caused National American Life Insurance Company to pay Latta an additional $45,000.00 for no consideration?

4. Did the trial court err in dismissing Count I of the Amended Complaint for failure to state a cause of action under the Investment Company Act of 1940 on behalf of National American Life and on behalf of its stockholders other than Wilder and in entering judgment for defendants based on said dismissal, where the Amended Complaint alleges that in violation of the Investment Company Act of 1940, defendant Wilder caused National American Life Insurance Company to be dominated by First Colonial Corp. of America (alleged to be an unregistered investment company), caused National American Life to lend more than One Million Dollars on inadequate security to First Colonial Corp. of America, caused National American Life to guarantee obligations of First Colonial Corp. of America, and caused National American Life to engage in purchases and sales of securities and in interstate commerce with First Colonial Corp. of America, all to the damage of National American Life Insurance Company and its stockholders?